

## **NEGOTIATION CONCEPTS WORKSHOP**

LANTNAVFACENGCOM Construction Division, Code CI5

### Introduction



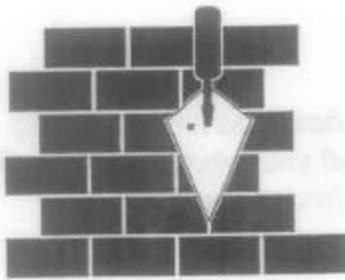
Negotiation is an important and time consuming responsibility of the construction contract administration business. We most frequently encounter negotiation situations at work in the execution of contract modifications and 8(a) contracts. Our monetary based negotiations are usually with construction contractors, but we also find ourselves negotiating with A/E's, Public Works Departments, and customers.

In a larger sense, we negotiate almost daily in our lives. We may discuss a performance award with our supervisor. We try to agree with a stranger over the price for his house. Lawyers try to settle a lawsuit as a result of a car accident. A group of oil companies plans a joint venture exploring for offshore oil. City officials meet with union leaders to avert a transit strike.

More and more occasions require negotiation; conflict is a growth industry – We find that fewer and fewer people are willing to accept decisions that affect them, but are made by someone else.

Standard strategies for negotiation often leave people dissatisfied, worn out, or alienated- and frequently, all three.

### Negotiation Methods



People find themselves in a dilemma. They see two ways to negotiate – soft or hard. In fact there is a third way to negotiate, a way that is neither hard or soft, but both hard and soft simultaneously. The method of principled negotiation, developed at the Harvard Negotiation Project is to decide issues based on their merits rather than through a haggling process focused on what each side says they will or will not do.

The method of Principled Negotiation is hard on the problem and soft on the people. The rules of Principled Negotiation are:

1. DON'T BARGAIN OVER POSITIONS
2. SEPARATE THE PEOPLE FROM THE PROBLEM
3. FOCUS ON INTERESTS, NOT POSITIONS
4. INVENT OPTIONS FOR MUTUAL GAIN (THINK WIN-WIN)
5. INSIST ON USING OBJECTIVE CRITERIA
6. BE PREPARED

The predominant belief about negotiation is it's a way of getting the most for yourself, or in our business, getting the contractor to accept the lowest possible price. But getting the lowest possible price may have been the reason that you're now trying to negotiate to change order! What we really want to achieve is fair and reasonable compensation to the contractor for his efforts. This means we want to pay him for his direct and indirect costs, plus enough profit to make it worth his while. Ideally, we should leave the negotiation believing that we've improved, or at least not damaged our relationship with the contractor, and responsibly used our authority to protect the taxpayer's investment in the project.

Let's talk about the more traditional method that everyone is familiar with. Positional Bargaining.

The following is an illustration of Positional Bargaining:

**AROICC**

*How much will it cost to put another door in this wall?*

*\$3,000 for a door! That's ridiculous. You should be able to do that for \$500.*

*Look, I might be able to go to \$1,000, but the ROICC would blow a gasket if he knew I paid \$2,700 for a door.*

*\$1,250. I can issue a unilateral you know!*

**CONTRACTOR**

*Well, that's a load bearing wall, I'd have to put up shoring and get a special lintel...Probably about \$3000.*

*Not a chance! The material cost would be much more than that alone. Those fire rated doors are expensive. I don't see it being less than \$2,700.*

*I can't believe how you're squeezing me here. I'll tell you what, just to make you happy, I'll install the door for \$2,300.*

*You're killing me! I can't buy this stuff at K-Mart and have my dog put it in. Please be reasonable!*

The negotiation method can be judged by three criteria. How does the example fair?

1. Does it produce a wise agreement if agreement is possible?  
(A wise agreement is defined as one that meets the legitimate interests of each side to the extent possible, resolves conflicts fairly, is sustainable, and takes the interests of affected parties into account.)
2. Efficient?
3. Improves, or at least does no damage to the relationship between the parties?

Let's look at the same situation, but employ a principled method of negotiation:

**AROICC**

*The customer would like to put another door here. What kind of expense do you think we're talking about?*

*What sort of labor are we looking at?*

*So that means about \$150 direct labor cost.  
What about your shoring?*

*I was pricing some doors last week at Door Supply just like what we need here. They quoted me \$1,200 delivered.*

**CONTRACTOR**

*Well, that's a load bearing wall, I'd have to put up shoring and get a special lintel... Probably about \$3,000.*

*I'd need a couple of carpenters for at least six hours.*

*I do have some shoring on the site that would work and not really cost anything extra, but the lintel would have to be ordered. Probably be about \$200, judging from what I paid on the last job.*

*That sounds close – I'd have to check around a little though.*

Let's test this method.

1. Does it produce a wise agreement if agreement is possible?
2. Efficient?
3. Improves, or at least does no damage to the relationship between the parties?

## DON'T BARGAIN OVER POSITIONS: COMPARISON CHART



### Problem Positional Bargaining: Which Game do you Play?

#### Soft

Participants are friends  
The goal is agreement

Make Concession to cultivate  
the relationship

Be soft on the people and the  
problem.

Trust others

Change your position easily

Make offers.

Disclose your bottom line

Accept one-side losses to  
reach agreement

Search for the single answer:  
the one *they* will accept

Try to avoid a contest of wills

Yield to pressure

#### Hard

Participants are adversaries.  
The goal is victory.

Demand concessions a  
condition of the relationship.

Be hard on the people and the  
problem.

Distrust others.

Dig into your position.

Make threats.

Mislead as to your bottom line

Demand one side gains as the  
price of agreement

Search for the single answer:  
the one *you* will accept

Try to win a contest of wills

Apply pressure

#### Principled

Participants are problem solvers.  
The goal is a wise outcome  
reached amicably and  
efficiently

#### Separate the people from the problem.

Be soft on the people and hard  
on the problem

Proceed independent of trust.

#### Focus on interests, not positions.

Explore interests.

Avoid having a bottom line

#### Invent options for mutual gain

#### Insist on using objective criteria

Try to reach a result based on  
standards independent of will

Reason and be open to reason;  
yield to principle, not pressure.

## **Good Things to Say and Do in Principled Negotiations**



**The way you conduct yourself and communicate during negotiations can be a major factor in the resulting agreements. The following are some suggestions for further discussion:**

“Correct me if I’m wrong about this...”

“The way I understand it...”

“I feel like I’m not getting a reasonable deal here...” (Someone can’t argue or dispute about the YOU feel!)

“ I think a fair settlement would be...(The most you could reasonably expect to get)”

“One alternative might be...(The most you could reasonably expect to get)”

“Let’s come up with a basis for the pricing...”

Bring a bag or dish of hard candy and pass it around.

Offer to get coffee or soda.

Get a comfortable room.

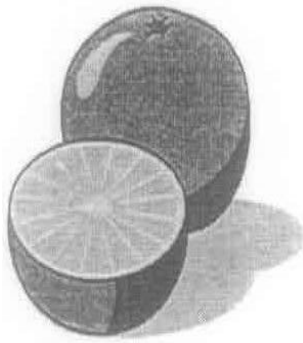
Schedule the negotiation at the contractor’s convenience.

Invite an expert (CONREP, AIC/EIC, Manufacture’s Rep).

Bring references and resources (Plans and Specifications, R.S. Means Guides CES, payrolls, vendor quotations).

Try to find out what is really important to the contractor.

An illustrative story:



Two sisters were both interested in the same orange. Being mature and reasonable, they agreed to cut the orange in half and share the orange. After cutting the orange the sisters parted company. The one sister went to her room removed the peel from the orange half, threw it away and ate the fruit. The second sister went to the kitchen, removed the peel that she wanted to use for baking and threw away the fruit.

Wouldn't the sisters have done much better if they understood what was important to them about the orange?

#### A Few More Stories:

A young PDC trainee called in a panic. "I'm negotiating a change order with a contractor who's come up with a bunch of stuff that I don't even understand. He's pressuring me to settle today, and I just don't know what to do!"

Don't be pressured into agreement. If the contractor hits you up with some show stoppers, then it's time for a recess, or shift to a different item or area that can be agreed on. Call on your resources to help you out. Nobody knows everything about construction, but know your strengths and limitations.

Make use of your computer and software. During negotiations in Iceland, the Government negotiators had set the voluminous estimate up on a computer spreadsheet. during negotiations, each minute change was plugged into the estimate, and a running total was available to the Government negotiators at all times. The contractor was frustrated by the knowledge that the Government knew the impact of every negotiated item. Although the knowledge had no substantial benefit, the psychological impact was significant. Eventually the negotiator was invited into the contractor's office to talk to *their* people about the value of computers in estimating and negotiating. This unprecedented gesture of cooperation turned the negotiation into a true win-win situation.

Empire builder George Turner started with a serious problem for a door-to-door salesperson – a distinct and prominent harelip. He capitalized on it. "I see you're looking at my harelip, ma'am," he said to prospective customers. "Heck, it's just something I put on this morning so a pretty lady like you would notice me."

## Know Your BATNA

The reason you negotiate is to produce something better than the results you can obtain without negotiating. What are those results? What is that alternative? What is your BATNA - your Best Alternative To a Negotiated Agreement? That is the standard against which any proposed agreement should be measured. Your BATNA protects you both from accepting terms that are too unfavorable and from rejecting terms that you should accept. In order to develop your BATNA, you must:

1. Invent a list of options that you might conceivably take if no agreement is reached. (Issue a unilateral, Issue a small purchase contract, terminate the contract, cancel the mod; possible in some customer requested changes) Improve some of the more promising ideas and convert them into practical alternatives.
2. Select tentatively the one best alternative.
3. The better your BATNA, the greater your ability to improve the terms of any negotiated agreement. Knowing what you are going to do if the negotiation does not lead to agreement will give you additional confidence in the negotiations. It's easier to break off negotiations if you know where you're going!

## What Some of the Experts say about Negotiation



*David D. Deltz and Alfred Modica: "Negotiate Your Way to Success"*

Never lose sight of the fact that settlements are negotiated because they are beneficial to both sides. Before you enter the negotiation, do your homework.

Research. Amass factual information to back up the case you want to make.

Psychological detective work. Think about your adversary. Likes, dislikes, flexible, narrow-minded?

Self-Evaluation. what are your strengths and weaknesses?

Plan your strategy. What will happen if you get what you want? When, where, and how will the negotiations be scheduled?

Practice. Actually rehearse the negotiations, using another person as the devil's advocate.

Use props and personal attitudes to dress up your negotiations and build credibility and impact. Start off with an air of formality. It gives you room to maneuver that you lose if you open more casually.

Use some sort of prop to help you control the pace of the session. carefully prepared research notes, blank legal pad and pen, videotape, or audiotape will help. Hand your adversary something-a copy of your material that captures the negotiator's attention and allows you to lead the conversation.

Never abuse your counterpart. You'll get a lot more by using "I really wish I could afford to pay you what this fine old house is worth" than with, "this old junk pile is about to fall over, and it will take a ton of money to get it into shape, so here is my top offer."

For every gain you make, give something in return, even if it is little more than formality.

*Jack Nadel "Cracking the Global Market"*

Get away from the other side of the desk. This means ridding yourself of an adversarial role. the reality is that you have a mutual problem to solve to your mutual advantage. Your intention and the intention of the person with whom you are negotiating must be to structure a deal that resolves the problem and gives each of you what you want.

Don't be greedy. That's trying to wring the last drop of blood out of someone in negotiation. It can blow deals, destroy relationships, and ruin businesses. It's totally unnecessary too. If there is not enough fair profit in the deal for both, move on to something else.

*Roger Dawson, "The Secrets of Power Negotiating"*

Avoid hostilities. The first few minutes set the climate of the entire negotiation. From the very beginning, avoid being confrontational. Power negotiators want to find solutions that are best for everyone. Confrontational negotiators are out to get everything they can. If you disagree with the other side's position, don't argue. Say "I know how you feel, others have felt that way but we've found..." and then state your response. the feel, felt found formula will diffuse hostility by allowing you to agree and disagree at the same time.

A stalemate is when both sides are talking but getting nowhere. The best way to establish momentum is to change the dynamics of the negotiations. For example, change team members, venues ("why don't we continue this over lunch?"), or take a break. You can also change details that don't involve concessions from either side.

Win-Win Endings: Make a concession at the end of the negotiations. No matter how small, the other side will feel like a winner. Also, always congratulate your counterparts.

*Max H. Bazeman and Margaret A. Neale "Negotiating Rationally"*

Consider the mythical fixed pie, a mind-set from which most people operate. This assumes that if one person gains, the other person loses and is called distributive negotiation. Distributive negotiation usually involves a single issue, or a fixed pie. But most negotiations are more than a fight over who gets how much of the pie, because there are usually multiple issues in a negotiation that each party values differently. These issues permit an integrative negotiation that offers benefits for all.



## NEGOTIATING TECHNIQUES

### PRE-NEGOTIATIONS

The most important factor to becoming a successful negotiator is to BE PREPARED. If, as a negotiator, you have not “done your homework,” chances are good that you will accept a position that you can neither understand nor support.

Probably the best way to get yourself ready for a negotiation is to prepare your own Government estimate. Preparing a quality, detailed Government estimate forces you to become familiar with the work as well as performing a constructibility review. If you have an estimate prepared by an independent estimator, another AROICC, and A/E or the EFD, this does not relieve you of the responsibility to review and check the estimate. This review/check should include a detailed review of the plans, specifications, quantities, pricing and equipment necessary to accomplish the work. Develop an estimate that you understand and can provide supporting back-up.

After receiving the contractor’s proposal, compare your estimate with the proposal. For a small change order, this could simply be a comparison of several items to determine the differences between the Government and the contractor’s position. For large or complex negotiations, it could mean a full-blown spreadsheet (determine the current requirements for preparation of Business Clearances). Make sure that the contractor submits his proposal in the required detail and in a satisfactory format.

After reviewing (or preparing) the Government estimate and reviewing the contractor’s proposal, establish a Government position and/or goals. Consider a “window” within which you will try to settle this negotiation. If you feel confident with your Government Estimate, this may be a good position for middle range of your “window.” The lower range of your “window” should be a tight, but defensible, position of your Government estimate that reflects the best possible situation. The upper range of your “window” probably would include safety margins and waste factors.

There are other ways to prepare yourself for a negotiation including:

- a) Confer with your supervisory engineer/supervisory ARO(E)EICC, ROICC office estimator or negotiator (if you have one), CONREP, EFD/EFA Construction Manager or Code CI47 estimators on pricing and/or construction techniques.
- b) Check with your Construction Manager, the Code CI4 designer or the A & E on technical problems and solutions.
- c) Review pricing guides for crew compositions and production rates.
- d) Contact one or more suppliers to develop independent pricing information on controversial material prices.
- e) Talk with your CONREP about job conditions, crew compositions, production rates, equipment on site, or special safety or environmental considerations.
- f) Visit your job site and become familiar with the conditions.

- g) Ask for assistance (i.e., supervisor, other AR(E)OICC's, Contract Specialist, other ROICC offices, EFD/EFA) since there is a good chance that someone before you has solved a similar problem.
- h) Talk to a craftsperson skilled in the area of a problem (i.e., Public Works carpenter, another contractor's electrician, your brother-in-law, your plumber).

Prior to actual talks with your contractor, prepare your position and a back-up position. If you have other team members for the Government, ensure that all agree that your approach makes sense.

### REMEMBER – BE PREPARED

### NEGOTIATIONS

The Government negotiator should take charge of the negotiations. This includes setting the time, date and place for meetings, as well as arranging the agenda. Handle all negotiations professionally. Small negotiations in many cases can be handled by telephone or at your desk. For large or complex projects, a private office or conference room is recommended to eliminate interruptions during negotiation sessions.

Open your negotiating session informally when meeting with the contractor for the first time. Explore his position before revealing your counter position or proposal. Listen to the contractor -- there will be times when he will convince you of a point or position. Be patient and hear what he has to say. Remember, your contractor is a businessperson. He can remain in the construction business only by making a fair profit. Due to the very competitive nature of our procurement process, the best opportunity to realize a profit may occur through negotiated work. Therefore, always be alert for positions that may take advantage of the situation. If you are reaching an impasse with the contractor, ask for his opinion of a better or more economical method of accomplishing the same result. A successful contractor remains in business because of "tricks of the trades" -- sometimes he may share these with you. On complex negotiations, the "team" concept works well -- two or three good minds all working in the same direction often will result in a superior solution to the problem or issue.

The Government requires a detailed proposal from the contractor. Although usually necessary, it can sometimes work to your disadvantage. A smart contractor can overwhelm you with details. An example might be for a vinyl tile floor -- the Government estimate would contain one item for square foot of tile. The proposal may contain many items including (1) preparation of concrete floor, (2) spreading adhesive, (3) setting tile, (4) cleaning tile, (5) waxing tile, (6) paper protection of tile and (7) removing paper protection. All of these items are required by the specification. If each of these items are priced for material and labor, the total could possibly double your estimate. You then have a problem trying to get the contractor back to your position. Remember, most pricing guides include all labor and material for a professional installation of a construction item.

If you think that you have caught your contractor in an undefendable position, do not back him into a corner without an escape route. Once he realizes his predicament, most contractors will change their position (in a face-saving manner) to be more realistic. Allow him this flexibility, and if he does not grab it, squeeze a little harder. Do not ridicule or try to make him look bad. If you have a contractor who consistently is disagreeable, do not let your personal prejudices or emotions affect your negotiations. This is sometimes particularly hard to do -- but try to maintain your professionalism.

It may be necessary to occasionally compromise or as some people say “split the difference” on a position or even make a “bottom line” comparison if this meets your established goals. You should only attempt this if small amounts of money are involved or if this is a small percentage of the total job. This is not a good tactic, and you do not want your contractors to be able to predict such traits. In fact, you do not want your contractors to be able to predict such traits. In fact, you do not want to become predictable in your negotiating tactics. Keep your contractor off-balance as to what you may do next. You want to be known to your contractor for your preparedness, firmness and fairness. Do not allow the contractor to attack your position and put you on the defensive. This is particularly important since a good defense of his position is to attack your position. Be alert – contractors will sometimes ask, “What do you have for this item?” and then ask how you arrived at that number. The next thing you know, you are defending your position. Keep the pressure on his position. Maintain control of the session at all times. You can give a little here and there -- but “win the war.” Keep your goals in sight at all times.

If negotiations are bogging down, analyze your alternatives. These could include:

- a) Deleting the work from contract
- b) Reducing the scope of work
- c) Using Government furnished material. (This is the last resort because of contractual problems that frequently arise.)
- d) Using a separate contract.
- e) Issuing a unilateral change order.
- f) Using Station forces (PW or SEABEE).
- g) Deferring work.
- h) Letting the Government assume the risk -- (reducing contingencies in the contractor’s position/proposal).

If you mention any of the above options during your negotiations, assume that your contractor will consider these alternatives as threats. You want to be careful about “threats” unless you are prepared to carry them out. Be sure that you have your supervisor’s “blessing” before introducing an alternative to the contractor. Once you introduce an option, be prepared to carry it out if the contractor does not change his position.

There are many varied tactics and strategies to use during negotiations when you've run across a contractor that is simply unreasonable and cannot justify his position. Be careful to appear natural and at ease when using these tactics. Ensure that they are inserted as a natural flow in the negotiations process.

For example, calculated emotionalism would be difficult to pre-plan, but a show of (mild) anger or restlessness at an appropriate point in the negotiations might get things untracked. Another strategy is to blame a third party, particularly your boss. If you get completely gridlocked, tell your contractor that you have discussed this with your supervisor and he agrees with your position and you do not have the authority to deviate. (Make sure that you have cleared this with your supervisor first.) You may also use the limited funds techniques by telling the contractor that you are having money problems. All of the above strategies should be used only when you are very firm on your position and do not intend to budge. Reversing ground on these types of strategies could damage your credibility.

Other tactics include bringing in an expert or "higher authority" for a negotiating session. It might only be necessary for the "expert" to agree with you or he may have to go into a great degree of detail on how things are built. Be sure to fully brief anyone that you take into negotiations and ensure that you are not surprised by anything he might say.

In many cases, one of your biggest bargaining chips can be "time." At some point in a tough negotiation, you might mention a possible "time extension" and watch for the contractor's reaction. Contractors consider "time is money" and may be willing to make major concessions in money for additional time. This particularly true when a contractor is seriously behind schedule due to his own negligence and liquidated damages may amount to a substantial sum. You must make sure that your "customer" can afford an extension of time before using this tactic.

For "after the fact" negotiations (such as when definitizing a UDC), daily reports and payrolls can substantiate or contradict the contractor's request. This kind of documentation has no defense. If you realize that "forward pricing" is impossible for a change, then observe and document the contractor's operations including crew sizes, production rates, payrolls and maybe even lost time inefficiencies.

If you have a good working relationship with your contractor; you may be able to use this to your advantage. A contractor is more likely to give in on a point to preserve the relationship, especially if he is as committed to Partnering as you. Be careful this does not work in reverse. One concessionary gesture that you might make is expediting payments or releasing some or all of the retention. This could possibly be very important to a contractor and might give you an advantage in your negotiations. Be careful not to promise something you can not deliver. If you appear to be bogged down, try a recess. This can be as short as a few minutes or as long as several days. It may be good to let the air "clear" and maybe to regroup. Hopefully, the contractor will be doing the same. Many times after such a recess, considerable progress can be made.

Do not forget the old Friday afternoon squeeze. It does not have to be Friday afternoon, but any time where there is an imposed deadline (real or artificial). This tactic is particularly effective if you sense that our contractor is anxious to settle.

And, finally, there is your strategy for all the overall negotiating process. Some negotiators like to start the process by telling the contractor what parts of his proposal they can agree to. This defines the differences so that all their energies can be directed at solving the problem areas. Many think this is not a good idea. If you agree with the contractor on a portion of his proposal, it tends to “lock” it in for him. If you get into a deadlock situation on another portion of his proposal, the contractor is less likely to absorb any of his costs into a portion that you have previously agreed tot. A better plan might be to ignore or “sluff over” the agreeable parts of his proposal. Many times the contractor may feel that he has some “slack” in these parts and may use this to get to your “bottom line.” If the contractor asks about a portion of his proposal that you have skipped over, you might tell him that you have no serious differences with that portion of his proposal but leave the door open for both you and him to go back and explore any “fat.”

REMEMBER – BE PREPARED – KEEP YOUR GOALS IN SIGHT

### POST NEGOTIATIONS

Besides all of the paperwork, which might include a post-business clearance spreadsheet, there are several other things that you need to do after your negotiation. You want to analyze the negotiating and estimating tactics that your contractor used. You should be better prepared on your next negotiation with him. Hopefully, there will be no surprises – but don’t count on it.

You will learn from every negotiation that you complete – but, remember, no matter how good a negotiator you become, never underestimate the need to ...

BE PREPARED

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Target Audience: AROICCS, AREICCS, Contract Specialists with less than one year of significant negotiating experience.